Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1825

WADE H. LITTRELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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STATUTORY PROVISION CONFERRING JURISDICTION TO REVIEW JUDGMENT BY WRIT OF CERTIORARI

Your Petitioner states that in the immediate case the judgment seeking to be reviewed was filed and entered on April 15, 1976. Further on May 18, 1976 the United States Court of Appeals for the Eighth Circuit pursuant to a *Petition of Appellant for Rehearing* denied said Petition.

The Appellant contends that this Court has jurisdiction to review the judgment by reason of 18 U.S.C. §3772 which reads as follows:

> "The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States court of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.
>
> The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorize may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed
>
> The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.
>
> Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, §60, 63 Stat. 98; July 7, 1958, Pub. L. 85-508, §12 (1), 72 Statu. 348; Mar. 18, 1959, Pub. L. 86-3, §14 (h), 73 Stat. 11."

QUESTIONS PRESENTED FOR REVIEW

Count I

1) Whether the Court Erred in Denying Appellant's Motion for a Directed Verdict on Count I on the Basis That the Uncontradicted Evidence Showed That Appellant Did Not in Fact Make a Return to the Internal Revenue Service of His 1969 Income, Therefore, Could Not Have Violated Title 26 U.S.C. §7206(1).

2) Whether the Court Erred in Denying Appellant's Motion for a Directed Verdict on Count I in That of the Amounts Received From the Corporations Which Were the Source of Appellant's Alleged Commissions, Payments Were Made Which Were Described in the Testimony of Internal Revenue Agent Hal Jackson as Payments Made to Employees of Said Corporations for Corporate Purposes and for Corporate Expenses and That Such Payments Exceeded in Amount the Alleged Omitted Commissions From Said Corporations.

3) Whether the Court Erred in Admitting Into Evidence a Check Made Payable to Appellant But Which Did Not Bear the Signature or Endorsement of Appellant and in the Absence of Any Evidence That Appellant Had Any Knowledge of the Check at the Time of the Alleged Offense Charged in the Indictment.

4) Whether the Court Erred in Admitting Into Evidence Micro-Films Copies of Only the Face of Checks Which Did Not Bear the Signature or Endorsement of Appellant.

5) Whether the Court Erred in Admitting Into Evidence Checks Made Payable to Appellant in the Absence of Corporate Records or Entries in Corporate Records Describing the Nature of the Checks.

Count II

1) Whether the Court Permitting the Government to Present to the Jury Checks Payable to Appellant and to Label Said Checks as Commission Income in Support of Count I Without Corporate Records in Corroboration Thereof Did So Prejudice the Jury That Appellant Could Not Receive a Fair and Impartial Trial.

2) Whether the Court Erred in Denying Appellant's Motion for a Directed Verdict in Count II on the Basis That the Testimony of the Revenue Officer Which Was the Basis of the Charge in Count II, Was Revealed on Cross-Examination to Be So Patently False and Unreliable That Such Denial by the Court and the Admission of Such Testimony by the Court Was an Abuse of Its Discretion.

APPLICABLE STATUTES

The applicable statute involved in this case is to be found in 26 U.S.C. §7206(1) and is the Statute under which Indictment was brought in this case said Statute reading as follows:

"§7206. Fraud and False Statements.

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or—

Shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

STATEMENT OF THE CASE

Count I

The evidence showed that appellant, a traveling salesman, submitted with full disclosure estimates to the preparer of the 1969 Form 1040, a certified public accountant and former internal revenue agent. Said estimates were necessitated by appellant's inability to secure an accounting of income from his corporate employers and his personal records being in transit from late March 1970 to early July 1970. The evidence also showed that appellant paid corporate employees and paid corporate expense in the amount $99,371.19 from funds received from his corporate employers. (Def. Ex. E-1-66. Tr. 210-220) Appellant was charged commission income for all funds received from his corporate employers although the revenue agent admitted that part of such funds were used to pay the aforesaid corporate employees and corporate expenses. Appellant inadvertently left the signed Form 1040 at the preparer's office and without authority or authorization preparer's secretary, contrary to the usual office practice, mailed the Form 1040.

In January 1969 appellant was employed by three corporations, newly organized by one Angelo Di Spirto, an attorney. The headquarters for Di Spirto and the corporations was in Woonsocket, Rhode Island. A sub-headquarters was established at Knoxville, Tennessee which became the base of operations for appellant until it closed in April 1969. After the close of the Knoxville Office and the transfer of records to Rhode Island, appellant's office was his suitcase. Appellant visited his home in St. Louis County on weekends at intervals of every two weeks or a month while traveling by auto in 1969 an estimated 60,000 to 80,000 miles. The business of the corporations was the sale of franchises for the erection and operation of motor inns, child day care centers and nursing homes. Appellant was given the

title director of sales and various corporate titles to facilitate sales of franchises. Appellant originally had an arrangement for compensation which included commissions, a stock interest and royalties on rooms actually constructed but Angelo Di Spirto constantly modified the agreement to the effect that out of the funds received from the Di Spirto corporations, appellant paid corporate employees and corporate expenses. Appellant acquiesced to the constant modifications of Di Spirto because according to Di Spirto it was for the corporate good and also appellant was to receive a stock interest and royalties if any facilities were constructed. (Tr. 176-186) In trial testimony Revenue Agent Hal Jackson confirmed that appellant had paid corporate employees and corporate expenses out of funds received from the corporations which funds in their totality Agent Jackson held were commissions. (Tr. 99-101)

In January 1970 Angelo Di Spirto requested that appellant move to Rhode Island but appellant delayed the move until by letter to the moving company the corporation agreed to pay the moving expense. (Tr. 188-189) Shortly after moving to Rhode Island, appellant severed his connections with Di Spirto and his corporations and returned to Missouri to look for work, leaving his wife in Rhode Island with still some unpacked belongings and personal effects including records. The furniture and belongings and wife of taxpayer remained in Rhode Island until early July 1970 at which time appellant's new Missouri employer at Poplar Bluff, Missouri agreed to pay the moving expense. (Tr. 192-194)

Early in 1970 appellant began seeking an accounting of his 1969 earnings from Laurette Lessard the corporate bookkeeper and secretary to Angelo Di Spirto. Appellant also requested an accounting on several occasions from Angelo Di Spirto but the answer given him was that his statement of earnings would not be available until an audit of the corporations then in progress could be completed. (Tr. 196-198)

In April 1970 appellant requested the annual preparer of his Form 1040, to secure an extension of time to file the Form 1040 for 1969 because of his inability to get an accounting of his 1969 transactions with the corporations or even to secure a Form 1099. The preparer of his Form 1040 prepared the request for extension of time to file and inserted as the reason for the request, the inability of appellant to secure an accounting from the corporate employers. Di Spirto shortly thereafter committed suicide or met his death and the corporation folded up. (Tr. 188) On or about June 8, 1970 appellant returned to the annual preparer of his Form 1040, Herbert A. Graham, a certified public accountant and former internal revenue agent and gave him some twenty sheets of paper, the first two or three listing the business expenditures and estimate of his income, the balance of the papers were household items prepared by appellant's wife in Rhode Island. The gross income figure was clearly an estimate in round numbers, $60,000.00, while the expenditures were taken from his pocket check book. Appellant told Mr. Graham that he did not get a statement of income from the corporations. (Tr. 196-198)

On June 12, 1970 appellant returned to Mr. Graham's office for his completed Form 1040. Mr. Graham assured him that his incomplete figures would not matter because his figures resulted in a net operating loss and it would be examined by the Internal Revenue Service and the examining officer would have access to the corporate records and would adjust the income figures up or down in the examination. (Tr. 201-202) Appellant's examination of the 1969 Form 1040 began on February 19, 1971. (Tr. 90)

Appellant also estimated a capital gain of $33,000.00 on the Form 1040 Mr. Graham prepared and on examination the Revenue Agent Jackson determined that it was overstated by $1,000.00 (Tr. 104)

Appellant signed the Form 1040 for 1969 in Mr. Graham's office and inadvertently in the confusion left the Form 1040 in the office, without any direction or authorization to anyone about the return. (Tr. 201-203) Mr. Graham testified that his office records indicate that his secretary had mailed the Form 1040. (Tr. 249)

Count II

There was a complete variance between the testimony of appellant that of the government's sole witness, an Internal Revenue Service Revenue Officer. Appellant testified that he was not notified that he was signing the statement under penalty of perjury; that he was ordered to sign said statement; that he was not given an opportunity to read said statement; that he was not asked the question about the ownership of the stock; or if asked, he did not hear the question; that he did not receive a copy of the statement he signed. The revenue officer testified in an extremely positive manner, about what he admitted was a routine matter which had occurred over four and one half years previously, to the effect that he remembered telling appellant that the statement was being signed under penalty of perjury and that he remembered asking appellant if he owned any stock. However, on cross-examination when asked about certain traumatic events related to the securing of the statement, the revenue officer was unable to remember any of the details and further he was unable to remember what statement, if any, relating to the alleged perjury he had given in an affidavit executed by him just two years prior to the trial. In summary Revenue Officer Schriver could not remember anything of the events which happened 4½ years before except two items needed for the conviction of appellant.

Appellant had an unpaid tax liability arising out of his 1968 taxes and on April 19, 1971 Revenue Officer James D. Schriver

of the Internal Revenue Service Poplar Bluff Office seized two automobiles in appellant's garage, one belonging to appellant's wife and the other to his daughter. The automobiles were disabled by chaining the steering wheel to the gas pedal. On May 3, 1971 appellant telephoned Revenue Officer Shriver to request under what conditions he could retrieve the automobiles. Mr. Schriver at first demanded full pay of some $8,200.00 but finally agreed to release the automobiles for $1,000.00.

Appellant proceeded by automobile from Poplar Bluff to the Kirkwood Bank of Commerce in St. Louis County, Missouri and got a loan on 4,000 shares of "Lettered AVTEC stock, a company which recently were "Public." Appellant secured a $1,000.00 cashier's check at the bank made out to the Internal Revenue Service and drove back to Poplar Bluff, Missouri.

Arriving at the Internal Revenue Service Office at about 4:00 p.m. he gave the $1,000 check to Mr. Schriver at the office counter, then Mr. Schriver directed him into an office for the securing of a financial statement. Mr. Schriver sat at a desk across from him on a chair and asked various questions and wrote as he talked. Appellant remembers only one question relating to money on him and he counted out the money which was in his pocket.

After filling out the forms Mr. Schriver directed appellant to sign the forms by saying "Sign—sign there." Appellant did not read the forms nor was he given copies of the forms. Mr. Schriver did not inform appellant that the forms were being signed under penalty of perjury. Appellant stated that Mr. Schriver did not ask him about any stock, or if he did ask, he didn't hear the question. The only instruction Mr. Schriver gave appellant was that if he missed any future payments enforcement action would begin again. (Tr. 221-229)

On direct examination Mr. Schriver testified in a very positive manner that he had asked appellant about the ownership

of stock and that appellant answered "none" and that he had stated to appellant that the form was to be signed under penalty perjury (Tr. 72) but on cross-examination he admitted that the financial statement was routinely taken in every case where full payment was not secured (Tr. 85) and that this statement must be secured before he could process the case out of his inventory of cases and that he constantly had several such cases in his inventory. Also on cross-examination Mr. Schriver could not remember his first contact with appellant and on the traumatic events of seizing the automobiles he could not remember how he had seized and disabled the automobiles, or positively where the automobiles were located or which Internal Revenue Service personnel had accompanied him to release the automobiles. (Tr. 88)

On cross-examination he testified that appellant had made two visits to his office on May 3, 1971 but couldn't explain why he did not furnish appellant with the financial statement form on the first visit so appellant could fill out the form himself. (Tr. 80-81)

On cross-examination relating to his positive statement that on May 3, 1971 he told appellant that he was signing the form under penalty of perjury, he admitted that he could not remember what statement he had made in an affidavit made in September 1973 regarding the alerting of appellant that he was signing under penalty of perjury. (Tr. 84)

A review is requested herein of a judgment of a Federal Court and the basis for federal jurisdiction in the Court of first instance is by reason of the fact that defendant Wade H. Littrell was indicted on two counts by a Federal Grand Jury in the Eastern District of Missouri, Eastern Division for a violation of §7206 (1), Title 26, United States Code.

ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

Count I

(1)

Appellant's contention that he did not file a Form 1040 for 1969 rests not only on his testimony that he inadvertently left the signed Form 1040 for 1969 in the office of the preparer of the Form 1040, Herbert Graham, C.P.A. on June 12, 1970, but also upon the testimony of Herbert Graham that his office records disclosed that the said Form 1040 was mailed by his secretary acting on her own without authority or direction of the appellant. (Tr. 249) Further an examination of Govt. Ex. 2, the 1969 Form 1040 discloses that attached to it is the envelope used to forward the said Form 1040, and that envelope bears a St. Louis Post Mark dated June 15, 1970, a full three days after appellant left Mr. Graham's office.

It is the contention of appellant that an essential element in the offense prohibited by Title 26 U.S.C. Sec. 7206(1) is the filing of the Form 1040 with the Internal Revenue Service and that appellant did not file said Form 1040 nor was it filed with his authorization or at his direction. In *U.S. v. Habig*, 390 US 222, 83 S.Ct. 926 it was held that the statute of limitations did not begin to run until the crime had been committed and that the crime could not have been committed until the return was filed.

(2)

It is the contention of appellant that the corporate funds received and deposited in the Kirkwood Bank of Commerce were in part impressed funds used to pay corporate expenses and that the funds so described in the testimony of Government's witness

Internal Revenue Agent Hal Jackson as used to pay corporate expenses were not gross income or "commissions" within the meaning of Section 61 of the Internal Revenue Code of 1954. (Tr. 99-101, Def. Ex. E-1-66)

The original documents on which the Government relies for its case, the corporate checks, fail to indicate to the payee the purpose for which the check was issued although on each check there is a space or a schedule provided for such an accounting. It is significant that appellant was not notified via the checks that Angelo DiSpirto had considered the checks in total to be commissions.

It is significant that Government's counsel has not replied to this alleged error of the Court and it was to be expected, for in the trial of the case it was apparent that Government's counsel could not grasp that the concept of gross income as defined in Section 61 of the Internal Revenue Code of 1954 is to be determined by the substance of the transactions and not by the form or the terminology used to describe the transactions. *U.S. v. Morse*, 491 F. 2nd 149.

If Government's contention that all of the corporate funds flowing to the appellant represented commission income, then the corporate records should show an accounts payable or loans payable in favor of the appellant for the corporate expenses paid by appellant. The Government has not introduced any evidence to show the existence of such accounts on the corporate books which accounts must be shown to validate the theory of the Government's case.

(3)

If for the sake of argument it was admitted that the check in question (Govt. Ex. 6) represented commission income to appellant, the element of willfulness in omitting said commission would still be lacking in the absence of any evidence that

appellant knew that his wife had received, endorsed and deposited the check. It is significant that all of the other checks deposited in the Kirkwood Bank of Commerce and introduced in evidence by the Government, were endorsed by the appellant. It is contended that for this check to be relevant, it would have to be shown that appellant had knowledge of the check in June 1970. The Government attempts to show that appellant had knowledge of the check at the time he gave the estimates and notes to the preparer of the Form 1040 for 1969 by relying on an attempted reconstruction by appellant of funds flowing to him from the corporations which reconstruction was made at the request of Special Agent Glenn Noeltner in December of 1972 approximately two and one half years after the return was prepared. (Govt. Ex. 29)

In the absence of knowledge of the check at the time the return was prepared there could not have been any criminal intent to willfully omit said item from the return. *U. S. v. Bishop*, 485 F. 2nd 248.

(4)

The Government did not present the best evidence which would have been the micro-film pictures of both sides of the checks. (Exs. 8 and 9) In the Government's offer of proof (Tr. 35) Government's counsel stated "If I can explain, these checks were received from a postal inspector and received by Glenn Noeltner. It is my understanding that the postal inspector got the fronts from the Industrial Bank of Rhode Island. The backs were blanked out on the micro-film, so all we had of any kind of record was this." The Government did not introduce any evidence to show any attempt was made to secure the complete copies of the checks, front and back which could have been obtained from the correspondent bank of the Industrial Bank of Rhode Island or from the Federal Reserve Bank which cleared the checks.

The Court indicated that its decision to admit the photocopies of the fronts of the checks was based partially on the fact that each of the copies bore the word "Processed" and that the word "Processed" appeared on similar checks issued to the appellant. In Government's brief, counsel again relies on the word "Processed" as indicative that appellant received and indorsed the checks in spite of the fact the use of the word "Processed" was explained to the Court and to Government's counsel as being totally irrelevant to the question as to whether appellant received and indorsed the checks. (Tr. 36)

The Government again tries to buttress its case for the admission of these two checks by relying on an attempted reconstruction of the tie in of checks issued to the sale of franchises and which reconstruction was made by appellant at the request of Special Agent Noeltner in December 1972. It is significant that these checks were not deposited or traced to appellant but that all other checks made payable to appellant by the corporations were deposited in appellant's account at the Commerce Bank of Kirkwood.

(5)

In the instance of the admission of the partial and incomplete documents admitted (Govt. Ex. 8 and 9), the Government used the corporate records describing the checks issued as commissions as the basis for their admission. The Government now departs from the corporate records as a basis for the admission of three checks (Govt. Ex. 10, 12 and 16) because the corporate records were shown to be incorrect, incomplete or nonexistent and relies solely on the attempted reconstruction by appellant (Govt. Ex. 29) in December 1972 made at the request of Special Agent Noeltner and from documents furnished at that time which was approximately two and one half years after the Form 1040 was prepared by Herbert Graham C.P.A. As previously discussed in Part IV, the reconstruction did not purport to show what income was received but purported to show only the attempt to tie in the franchises sold with the checks issued by the corporations.

Although Laurette Lessard the Government's witness and alleged bookkeeper of the corporations testified that the corporations had two or three auditors in their one year of operations (Tr. 42) there is no evidence that Agents Noeltner or Jackson made any attempt to interview the auditors or inspect their workpapers in order to determine what induced the auditors to terminate their auditing engagements with the corporations or Angelo DiSpirto. Laurette Lessard also testified that although she was the "bookkeeper" of the corporations, she did not know if corporate tax returns were filed, or if Forms 1099 were issued and filed (Tr. 46-47) and in spite of these apparent gross irregularities, there is no evidence that Agents Noeltner or Jackson made any attempt to determine the correctness of the corporate records or if any corporate Federal income tax returns were filed or if Forms 1099 were issued to appellant and copies filed with the Internal Revenue Service. Clearly Agents Noeltner and Jackson were determined not to pursue any investigation which might lead to the exculpation of appellant.

Count II

(1)

The Government while well knowing from the testimony of its own witness that appellant used funds received from the corporations to pay corporate employees and other corporate expenses did inundate the unsophisticated Jury with these and other checks under the guise that the checks represented commission income to appellant. Standing alone, the testimony of the revenue officer was patently unreliable but when considered by the Jury in conjunction with the alleged amount of funds received by appellant which the Court erroneously admitted as commission income, the Jury was not prepared to give the ap-

pellant a fair and impartial trial. It was evident that the Jury was not prepared to believe the appellant's testimony irrespective of its content.

(2)

The testimony of the revenue officer was very positive on the elements needed to support the charge in Count II (Tr. 72) but on cross-examination he admitted that these same elements were but routine matters in the collection process involving appellant which had taken place more than 4½ years before his testimony. (Tr. 85) The revenue officer was unable to remember any of the traumatic events which took place in the collection process involving appellant, such as the seizing and disabling of the automobiles. (Tr. 87-88) The revenue officer was unable to remember what statement he had made in an affidavit in September 1973 regarding the alleged alerting of appellant to the fact that he was signing the financial statement form under penalty of perjury. (Tr. 84) An examination of the financial statement prepared by the revenue officer will reveal that it was hurriedly prepared and without much care. (Govt. Ex. 25)

CONCLUSION

Wherefore, Appellant prays that the Supreme Court of the United States grant his Petition for Writ of Certiorari filed herein and review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 75-1783

United States of America, Appellee,

v.

Wade H. Littrell, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 9, 1976

Filed: April 15, 1976

Before Gibson, Chief Judge, Bright, Circuit Judge, and Van Pelt, Senior District Judge.*

Van Pelt, Senior District Judge.

This is an appeal from a conviction on a two-count indictment charging income tax fraud. Count I charged an understating of true gross income for 1969 by approximately $57,500. Count II charged a false material statement made under the penalties of perjury relating to defendant's ownership of 4,000 shares of AVTEK Corp. common stock. While the more numerous errors assigned relate to Count I, a reversal as to each count is requested.

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* The Honorable Robert Van Pelt, United States Senior District Judge for the District of Nebraska, sitting by designation.

As to both counts defendant claims error in denying his motion for a directed verdict. Errors in the receiving of evidence are also claimed as to each count. In addition it is claimed defendant did not receive a fair trial and that the trial judge's rulings on evidence constituted an abuse of discretion. Since the errors in reception of evidence must be discussed individually, they will not be separately stated at this point.

The evidence shows defendant was a traveling salesman employed by three corporations newly organized by an attorney named Di Spirto, with headquarters in Woonsocket, Rhode Island. A subheadquarters established in Knoxville, Tennessee, was closed in April, 1969. Defendant's residence for 1969 was in St. Louis County, Missouri. In January, 1970, Di Spirto requested him to move to Rhode Island, which move was delayed until the corporation agreed to pay moving expense. Shortly after moving defendant severed his connection with Di Spirto and returned to Missouri to look for work, leaving his wife and certain records in Rhode Island until early July, 1970, when defendant moved to Poplar Bluff, Missouri.

In early 1970 defendant attempted to procure an accounting of his earnings from Laurette H. Lessard, who was Di Spirto's secretary and corporate bookkeeper, and in April, 1970, requested a certified public accountant, Herbert A. Graham, who had previously prepared his income tax returns, to secure an extension of time in which to file a Form 1040 for 1969. During this time Di Spirto died, perhaps by suicide.

About June 8, 1970, defendant delivered to Graham some twenty sheets of paper, including a listing of business expense and an estimate of his income. He told Graham he did not get a statement of income from his corporation employers. The gross income figure was an estimate in rounded figures of $60,000. The expenses were from his pocket checkbook.

On June 12, 1970, he returned to Graham's office for the completed Form 1040 and was told by Graham that his in-

complete figures wouldn't matter because his figures indicated a net operation loss, that the return would be examined by the Internal Revenue Service, who would have access to the corporate records and could adjust his income up or down.

Defendant estimated a capital gain of $33,000 on his Form 1040, which later examination showed was overstated by $1000.

It was stipulated that defendant signed the 1040 form in Graham's office. Defendant stated it was left in the office. Graham's secretary on or about June 15, 1970, mailed the executed 1040 form to the IRS. It was received at the North Atlantic Service Center, Andover, Massachusetts, on June 17, 1970. The evidence further showed that on November 29, 1971, at a conference with Chief Special Agent Noeltner, attended by defendant and Mr. Graham, defendant was shown the 1040 form and indicated he had signed it in St. Louis and mailed it from St. Louis and that before signing he had checked it for accuracy.

It is argued that the testimony of the revenue officer was so patently false and unreliable that its receipt in evidence was an abuse of discretion and further support of the claim of error in denying the motion for directed verdict as to Count II.

The claim goes to the revenue officer's ability to remember events which took place four and one-half years before. Again the jury is the proper body to evaluate the weight to be given testimony. It is not unusual that an officer or any other witness will not remember all details. One of the purposes of cross-examination is to cast doubt on credibility. But it remains that even the careless witness may be credible. The jury saw and heard the revenue officer and the defendant. Their evaluation will stand.

Error is claimed as to Count I that payments made by defendant for corporate purposes and expenses exceeded in amount

the alleged omitted commissions and that this made submission of Count I to the jury erroneous. Defendant testified he was directed by Di Spirto to pay such expenses out of corporate funds supplied him.

This is the most plausible defense urged. The trouble with it is that the jury did not believe the defendant's version. The trial judge carefully outlined this defense in his charge and placed the burden on the government to prove beyond a reasonable doubt guilty intent. The court further said he may have subscribed to such:

> He may have subscribed to such factually incorrect return or statement because of surprise, confusion, haste, inadvertance [sic], honest mistake as to the facts, carelessness or negligence. As has been said you may not find him guilty unless you find beyond a reasonable doubt that the subscribing to the factually incorrect return or statement was willful and that the other elements of the offense are present.

and again stated later in the charge that the jury could not find him guilty unless it found beyond a reasonable doubt that the subscribing to the factually incorrect return or statement was willful. We conclude, as did the trial judge, that the evidence required submission of the count to the jury. From the defendant's standpoint it is said, but the jury just didn't believe his defense.

Without detailing the testimony as to Count I, suffice it to say that there was testimony believed by the jury that Littrell had gross income for the year 1969 of $117,500. Bank or Savings and Loan deposits to his account totalling $107,500 were shown. An exhibit listing his 1969 income given by defendant to an IRS agent indicated he had $100,000 of gross income for 1969. If believed, the evidence clearly showed gross income many thousands of dollars in excess of the $60,000 set forth on the 1040 form. The evidence was clearly sufficient to submit Count I to the jury.

Count II results from a conference defendant had with an IRS officer, James D. Schriver, at Poplar Bluff, Missouri, relating to his 1968 return and the seizure of two automobiles to apply on approximately $8,200 taxes he owed. After an earlier telephone conversation with Schriver and the making of an agreement to release the automobiles on payment of $1,000, defendant went to the Kirkwood bank and got a loan of $1,000, represented by a cashier's check, on 4,000 shares of AVTEK stock, and returned to Poplar Bluff. There, on May 3, 1971, he delivered the $1,000 cashier's check to Schriver, who directed him to an office for securing a financial statement. Certain forms were filled out by Schriver and signed by defendant. A question on one form related to ownership of stock to which the answer was written, none. It is this answer the government claims was perjury.

Defendant's evidence and that of the agent are in conflict. Defendant claims he did not read the forms, was directed to sign by Schriver, who said "Sign—sign this"; that he was not told the signing was under the penalty of perjury and that Schriver asked him no questions about stock or if he did, that he didn't hear the question. The officer testified he asked about stock ownership, that defendant answered "none" and was told that the form was to be signed under penalty of perjury. The evidence showed that on May 3, 1971, the day defendant borrowed the $1,000 on the 4,000 shares of AVTEK stock, the stock was worth $8.50 a share, or $34,000. It serves little purpose to further outline the conflicting testimony. The evidence was sufficient as to Count II for submission to the jury. The jury believed the officer and disbelieved the defendant.

We next turn to the claimed errors in admission of evidence.

Over objection, a check for $5,000, dated March 27, 1969, drawn by Tartan Motor Inn, Inc., payable to defendant, was received in evidence as Exhibit 6. It did not bear the personal en-

dorsement of defendant. It was endorsed "Wade H. Littrell, by R. R. Littrell for deposit only Kirkwood Bank." R. R. Littrell was the wife of defendant. The check was deposited April 2, 1969, in a joint bank account of the husband and wife in Kirkwood Bank, Kirkwood, Missouri. It is the claim of defendant that he was not shown to have had any knowledge of the receipt of the check at the time he signed the 1040 form.

The United States of America produced as a witness, Laurette H. Lessard, who was bookkeeper for the three companies for which defendant had made sales and thus earned commissions. She identified Exhibit 16, being the journal, the invoices received, cash disbursements, cash received and petty cash for Tartan Motor Inns. She identified Exhibit 17, the general ledger for Tartan Motor Inns, and laid foundation for these records. She testified that the general ledger shows payment of commissions to defendant, including a payment made March 27, 1969, for $5,000. This check is Exhibit 6, check No. 183. As above noted, Exhibit 16 also shows this entry. Exhibit 29, prepared by Agent Noeltner, lists this same item as a commission. Mr. Noeltner testified the information on Exhibit 29 was received by him from defendant on December 19, 1972. These three exhibits were received in evidence without objection.

We conclude that Exhibit 6, having been deposited to the joint account of defendant and his wife, being the same account to which other commission checks for many thousands of dollars were deposited by defendant, was properly received in view of the other supporting exhibits. We conclude the jury was within its right as the finder of fact to disbelieve defendant's claim that he didn't know of this check when he signed his 1969 income tax return.

It is claimed that the trial court was in error in receiving in evidence Exhibits 8 and 9. These exhibits were photocopies of the faces of checks Nos. 101 and 102, dated June 12 and June

23, 1969, respectively, for $2,500 and for $5,000, drawn by Tartan Motor Inns, bearing the signature of Laurette H. Lessard. Complaint was made by defendant that these checks were not shown to have been deposited to any bank account of the defendant. These checks were shown upon the journals of Tartan Motor Inns, which were identified by the bookkeeper, Mrs. Lessard. They were also listed by Agent Noeltner on Exhibit 29 from information furnished the agent by the defendant. Mrs. Lessard in her testimony stated that these checks were commissions. Thus, the court did not abuse its discretion in receiving the exhibits.

Error is also claimed in the receiving in evidence of Exhibits 10, 12 and 16. It is claimed that no supporting entries were found in the corporate records. While appellant's brief refers to Exhibit 16 (see page 15 of appellant's brief), the record shows the check complained of to be Exhibit 13. Exhibit 16 is one of the corporate records identified by Mrs. Lessard. Exhibit 13 is check No. 1001 in the sum of $5,000. The stipulation, Exhibit 1, described this check as follows:

> 16. A check drawn on the account of Little Shavers Day Care Centers, Inc., No. 1001, dated May 5, 1969, made payable to Wade H. Littrell in the amount of $5,000, was endorsed by Wade H. Littrell and deposited in total in the joint account of Wade H. Littrell and Rowens R. Littrell at the Commerce Bank of Kirkwood, Missouri [formerly known as the Kirkwood Bank, Kirkwood, Missouri], on May 6, 1969.

With respect to Exhibit 10, the stipulation shows:

> 10. A check drawn on the account of Tartan Motor Inns, Inc., No. 105, dated June 30, 1969, made payable to Wade H. Littrell in the amount of $15,116.66, was first endorsed by Wade H. Littrell and, second endorsed by Laurette Lessard. This check was given to the Industrial

> National Bank of Rhode Island, Providence, Rhode Island, and used to purchase two cashier's checks Nos. 90059366 and 90058367 [sic], drawn on the Industrial National Bank of Rhode Island, Providence, Rhode Island.

With respect to Exhibit 12, the stipulation shows:

> 14. A check drawn on the account of Tartan Nursing Homes, Inc., No. 50, dated December 22, 1969, made payable to Wade H. Littrell in the amount of $15,000, was endorsed by Wade H. Littrell and deposited in total in the joint account of Wade H. Littrell and Rowens R. Littrell at the Commerce Bank of Kirkwood, Missouri [formerly known as the Kirkwood Bank, Kirkwood, Missouri], on December 23, 1969.

The opening paragraph of the stipulation read:

> It is hereby stipulated and agreed upon that had the appropriate witnesses testified that their testimony would have been in substance as follows, and that the following documents would have been identified, and facts proved: * * *.

Gladys Sherry, secretary to the president of Little Shavers Day Care Centers, Inc., identified Exhibit 13 as a copy she had made from checks of Little Shavers in her possession. She stated that there are no books and records of the corporation in existence that she knew of. Agent Noeltner testified as to entries on Exhibit 29 relating to Exhibit 10.

Mrs. Lessard testified to entries on the ledger journal of Tartan Nursing Homes, Inc., Exhibit 18, showing a cash disbursement and describing check No. 50, which is Exhibit 12. She also identified check No. 105, which is Exhibit 10. An entry relating to Exhibit 10 is shown on sheet CD8 of Exhibit 16. From this we conclude that the corporate records do con-

tain entries relating to each of these exhibits. Under these circumstances, the stipulation, Exhibit 1, being in evidence, it was within the trial court's discretion to receive the exhibits.

Because a man's liberty is at stake, we have concluded to discuss the record in detail rather than adopt the government's contention that the assignments are frivolous.

The defendant had a fair trial. The jury did not believe his defense. His sentence is well within permissible limits. The conviction and sentence are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[Not to be published.]

United States Court of Appeals
For the Eighth Circuit

September Term, 1975

75-1783

The United States, Appellee, vs. Wade H. Littrell, Appellant.	}	Appeal from the United States District Court for the Eastern District of Missouri

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 18, 1976

Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

No. 75-1825

In the Supreme Court of the United States

OCTOBER TERM, 1976

WADE H. LITTRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1825

WADE H. LITTRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the sufficiency and admissibility of evidence in his trial for filing a false income tax return and false statement of financial condition with the Internal Revenue Service.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of willfully filing a false income tax return for 1969 in which he knowingly understated his gross income by $57,500, in violation of 26 U.S.C. 7206(1); and willfully filing with the Internal Revenue Service a false statement of financial condition, in violation of 26 U.S.C. 7206(1) (Tr. 13-14).[1] The court sentenced petitioner to one-year concurrent prison terms (Tr. 309).

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[1]"Tr." refers to the transcript of trial proceedings.

The pertinent facts are as follows: Petitioner, a travelling salesman, reported on his 1969 income tax return that he had received gross commission income of $60,000 from his employers, a group of corporations owned and operated by Angelo DiSpirto (Tr. 171, 175; Govt. Ex. 2). However, by means of testimony and documentary evidence, the government proved that petitioner's actual gross commission income for 1969 was $117,500 (Pet. App. A 4). The evidence further showed that petitioner owned 4,000 shares of the common stock of AVTEC Corporation on May 3, 1971, and failed to disclose it on a Statement of Financial Condition filed with the Internal Revenue Service on that date (Tr. 17; Govt. Ex. 25).

1. Petitioner contends (Pet. 11) that he did not file the 1969 tax return in question. But it was stipulated that on June 12, 1970, petitioner signed that return (Govt. Ex. 2) in the office of his accountant who prepared it and that the Internal Revenue Service received it on June 17, 1970 (Tr. 17). Although petitioner did not personally mail the return, that fact is of no consequence. The jury was amply justified in concluding that petitioner's signing of the return signaled his intention that the return should be mailed to the Internal Revenue Service, for it was due to be filed five days later, and had been prepared by the accountant from information furnished him by petitioner (Tr. 255). When the accountant or his employee mailed the return, they were acting on behalf of petitioner and within the scope of their authority.

2. Petitioner further contends (Pet. 11-12) that the evidence was insufficient because certain of the checks claimed by the government to represent commission income to petitioner were in fact given to him by the corporations for the payment of certain corporate expenses. In support of this argument, petitioner relies upon

his testimony that under his contract with DiSpirto he was required to pay certain corporate expenses out of the funds he received from the corporations (Tr. 181-187).

The government proved that petitioner had received in execss of $100,000 in sales commissions (Tr. 25-33, 38-41, 51-52). The jury was instructed that the government had the burden of proving its case beyond a reasonable doubt (Tr. 292), and that it was the petitioner's contention that the total funds received from the corporations during the year 1969 included amounts that, as required by the corporations, were used to pay corporate expenses and, therefore, were not chargeable as gross income to him (Tr. 297). As the court of appeals correctly noted (Pet. App. A 3-A 4),[2] petitioner's defense that all of the funds received were not gross income because a portion of the funds were for the payment of corporate expenses involved a question of credibility. The jury was not required to believe that the checks in question were paid to petitioner for this purpose and, by its verdict, resolved this question against the petitioner.

3. Petitioner also argues (Pet. 12-13) that the trial court erred in admitting into evidence Government Exhibit 6, a $5,000 commission check, because petitioner did not personally endorse it. But this check was endorsed for

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[2]The court of appeals was satisfied with the sufficiency of the evidence, stating (Pet. App. A 4):

> Without detailing the testimony as to Count 1, suffice it to say that there was testimony believed by the jury that Littrell had gross income for the year 1969 of $117,500. Bank or savings and loan deposits to his account totalling $107,500 were shown. An exhibit listing his 1969 income given by defendant to an IRS agent indicated he had $100,000 of gross income for 1969. If believed, the evidence clearly showed gross income many thousands of dollars in excess of the $60,000 set forth on the 1040 form. The evidence was clearly sufficient to submit Count 1 to the jury.

deposit by petitioner's wife and deposited to their joint checking account (Tr. 32, 185; Govt. Ex. 6). The jury could thereby readily infer that petitioner had knowledge of the check, despite the fact that he did not endorse it personally.[3]

4. Finally, petitioner contends (Pet. 16) that his conviction for filing a false statement of financial condition (Form 433-AB) cannot stand without the testimony of the revenue officer, which he claims is not worthy of belief. But the jury resolved the question of the credibility of the witness against petitioner and that is the end of the matter. And the fact that the revenue officer stated that the filing of a statement of financial condition

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[3]Petitioner also argues (Pet. 14-15) that three checks (Govt. Exs. 10, 12 and 16 [should be 13] were improperly admitted in evidence because the corporate books to authenticate them were unavailable. However, there was no need for such authentication. First, it was stipulated that the endorsements on all checks introduced into evidence were those of petitioner, with the exception of the $5,000 check (Govt. Ex. 6) deposited by his wife (Tr. 18-19). Second, it was stipulated that these same three checks were all made payable to petitioner and were in fact endorsed by him (Tr. 19, 21). Moreover, petitioner admitted during the investigation that his gross commissions for 1969 were $100,000, $40,000 in excess of the amount reported on the tax return (Tr. 90-92, 93; Govt. Ex. 26).

There is likewise no merit to petitioner's contention (Pet. 13-14) that the district court erred in admitting into evidence Government Exhibits 8 and 9, which were photocopies of two commission checks, because the backs of the checks were not photographed. These checks are shown on the corporate books to be commissions paid to petitioner (Tr. 29-32, 232) and they were payable to him. Moreover, petitioner admitted during the investigation that those checks constituted commissions paid to him (Govt. Ex. 29; Tr. 121, 124).

is a "routine" matter in the tax collection process does not excuse petitioner's submission of a false statement.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[4]The Fifth Circuit has recently held that the filing of a false Form 433-AB could not be prosecuted under 26 U.S.C. 7206(1) because that form was not one which was required to be filed by the Code or regulations. *United States* v. *Levy*, 533 F. 2d 969 (C.A. 5). Although we believe that decision is erroneous, there is no reason for review of petitioner's conviction because he has not raised the question whether Section 7206(1) encompasses the filing of a false Form 433-AB. Moreover, the prison sentences imposed on the two counts are concurrent and no fines were imposed. Therefore, even if Section 7206 (1) could not be applied to the filing of a false Form 433-AB, the validity of the sentence on petitioner's conviction for filing a false income tax return would not be affected. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

DOJ-1976-08